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April 9, 1990

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By: Hand Delivery

Federal Communications Commission  
Office of the Secretary

Roy J. Stewart, Esq.  
Chief  
Mass Media Bureau  
Federal Communications Commission  
1919 M Street, N.W.  
Washington, D.C. 20554

DOCKET FILE COPY ORIGINAL

Re: FCC File No. DA-1060

Dear Mr. Stewart:

On March 15, 1990, we filed on behalf of A.C. Nielsen Company ("Nielsen") a "Request for Permissive Authority" in the above-referenced proceeding. Copies of Nielsen's Request were placed in the Commission's public files and, even though not required, were served upon counsel for Airtrax and Vidcode, Inc. Pursuant to Sections 1.4 and 1.45 of the Commission's Rules, 47 C.F.R. §§ 1.4, 1.45 (1989), oppositions to Nielsen's Request were due to be filed no later than March 28, 1990. To Nielsen's knowledge, no opposition to the Request was filed in a timely fashion by Airtrax, Vidcode or any other party.

Nielsen understands that, on March 22, 1989, representatives of Airtrax visited with you and Mr. Ratcliffe to discuss this matter<sup>1/</sup>. In light of the absence of any opposition, and in the hope of avoiding further delays in the Commission's review, this letter requests the immediate grant of Nielsen's Request and outlines Nielsen's position regarding the proposals Airtrax is reported to have made to you.

Airtrax's proposed "rulemaking proceeding concerning the use of line 22" is unnecessary and the institution of such a proceeding cannot be allowed to delay further the issuance of

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<sup>1/</sup>Contrary to the requirements of Section 1.1206 of the Commission's Rules, 47 C.F.R. § 1.1206 (1989), but consistent with the irregularities that have prevailed throughout this proceeding, notice of Airtrax's meeting with the Commission was not served upon Nielsen until almost a week after the meeting was held.

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Nielsen's requested Authority. The Commission has fully investigated all relevant areas of review, such as the technical characteristics and purposes of transmitting Nielsen's AMOL Codes, and has at least twice determined that Nielsen's Request meets all the criteria that have been imposed upon similar requests in the past.

Moreover, there are no issues of conflicting uses of line 22 that need to be addressed in a rulemaking proceeding or otherwise. Contrary to the implications created by Airtrax's active opposition to Nielsen's Request, Airtrax is not actively engaged in using, or even preparing to use, line 22 at this time. It is neither encoding any programs or commercials, marketing its services, employing full-time personnel, nor otherwise involved in any business requiring the use of line 22 transmissions. As was demonstrated by the fact that no conflicting uses of line 22 surfaced during the Temporary Authorization period, there simply are no issues of conflict justifying the expenditures of public and private resources or the further delay necessarily incident to the initiation of, and participation in, a rulemaking proceeding. Even if there were issues of conflicting uses of line 22, these should be left to the marketplace to resolve.

If the Commission nevertheless determines that a rulemaking proceeding is necessary, Nielsen should not be subjected to competitive impairments, not visited upon others that have already received authority to use line 22, by having issuance of its authority delayed pending the outcome of the rulemaking proceeding. There is no evidence or reason to expect that Nielsen's use of line 22 has adversely affected, or will adversely affect, other authorized users of line 22. No reasonable basis exists to delay, pending the resolution of such a rulemaking proceeding, the issuance to Nielsen of the same authority that has been issued to others.

Airtrax's proposal that "some sort of coordination be explored by the Commission in order that engineers from interested users on line 22 be afforded a forum through which conflicting uses of line 22 could be resolved" also is misplaced. Nielsen favors avoiding conflicts among users, but suggests that the Commission wait for such conflicts to occur before undertaking an interference in the marketplace in an effort to solve a problem that does not exist. As stated in its Request, Nielsen's use of line 22 during the Temporary Authorization period has established that there are no conflicts that must be resolved by the Commission at this time.

When and if such conflicts occur, it will be the marketplace -- not the Commission -- that is likely to be the best arbitrator of such conflicts. Any solution the Commission imposes based

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upon current users, uses and technology would have to be revised continuously as changes in those characteristics occur. The marketplace will achieve that result far more efficiently by supporting whatever uses are demanded and are economically viable.

In any case, issuance of authority to Nielsen should not be delayed by the Commission's consideration or implementation of this Airtrax request. The "coordination" Nielsen understands Airtrax to have proposed will take substantial time to investigate and implement. There is no reason why Nielsen should be prohibited uniquely from using line 22 in the interim, particularly when no adverse effect has been shown to follow from that use.

Nielsen also objects to Airtrax's proposals that Nielsen's permanent authority "should carry with it the same conditions imposed" in Nielsen's Temporary Authorization, and should require that Nielsen "provide notice to other users of line 22 before it begins coding programming for broadcast within specified television markets." Especially in light of the fact that Airtrax is not involved in transmitting SID codes on line 22, there is no reason whatsoever for continuing to apply to Nielsen the burdensome requirements that have been imposed upon Nielsen during the Temporary Authorization period to protect Airtrax, and which have not been imposed upon any other party receiving line 22 authority. Nielsen's use of line 22 has not led to even a single complaint from Airtrax or any other user that it has been adversely affected by Nielsen's use of the line, nor has it otherwise provided any basis for the further imposition of those requirements. To impose special limitations uniquely on Nielsen's use of line 22 would be constitutionally unacceptable.

This is especially true with regard to the new notice requirement Airtrax would impose upon Nielsen. Such a requirement would be extremely burdensome given Nielsen's need to track the broadcasts of extensive syndicated programming, and would be totally unnecessary given that Airtrax is not even using line 22, and given that Nielsen and other authorized users must obtain the authority of programmers before writing codes on their programs. If any notice requirement should apply, it should be imposed upon Airtrax and any other users who claim that they would be harmed fatally were even a single instance of accidental overwriting to occur. Short of giving that notice, these supposed conflicting users should not be allowed to delay or interfere further with Nielsen's use of line 22 based solely upon the unsupported and speculative contentions of non-users.

In light of the failure of any party to file a timely

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opposition to Nielsen's Request, and because this proceeding already has been delayed extensively by the unusual procedures that have been applied uniquely to the review of Nielsen's Request, Nielsen herein requests that its Request for Permissive Authority be granted immediately. This matter has already been pending with the Commission for over nine months, and further delay cannot be tolerated by the syndicated programming industry, especially when the temporary authority issued to Nielsen is due to expire in a few weeks. If for any reason the Commission's grant of Nielsen's Request is delayed past the time that the Temporary Authority is due to expire, Nielsen herein requests that its Temporary Authority be extended indefinitely until the Commission has resolved this matter finally.

Any further questions regarding this matter may be referred to the undersigned.

Sincerely,

A handwritten signature in dark ink, appearing to read "Grier C. Raclin". The signature is fluid and cursive, with the first name "Grier" being the most prominent.

Grier C. Raclin  
Counsel to A.C. Nielsen  
Company

cc: All Parties on attached list

Service List

Copies of the foregoing Letter to Roy J. Stewart from A. C. Nielsen dated April 9, 1990, were served this 9th day of April, 1990, by hand or by first-class mail, postage prepaid, on the following:

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\* By hand delivery.

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